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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. **74-6065**

TERRY SELMAN,

Petitioner,

-v.-

STATE OF LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF LOUISIANA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Louisiana entered on June 10, 1974, rehearing denied, October 11, 1974.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Louisiana is reported at ___La.___, 300 So.2d 467 (1974), and is set out in Appendix A hereto, pp. 1a-12a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Louisiana was entered on June 10, 1974, rehearing denied, October 11, 1974, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of aggravated rape under the law of Louisiana violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Whether the intentional systematic and complete exclusion of women from the general venire list from which petitioner's petit jury panel was drawn violated his rights under the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Revised Statutes Annotated and Code of Criminal Procedure of Louisiana:

> La. Rev. Stat. Ann. §14:27 (1974). "Attempt.
> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.
> B. Mere preparation to commit a crime shall not be sufficient to constitute an attempt; but lying in wait with a dangerous weapon with the intent to commit a crime, or searching for the intended victim with a dangerous weapon with the intent to commit a crime, shall be sufficient to constitute an attempt to commit the offense intended.
> C. An attempt is a separate but lesser grade of the intended crime; and any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt.
> D. Whoever attempts to commit any crime shall be punished as follows:
> (1) If the offense so attempted is punishable by death or life imprisonment, he shall be imprisoned at hard labor for not more than twenty years. . . "

> La. Rev. Stat. Ann. §14:41 (1974). "Rape defined.
> Rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, [sic] the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime.

La. Rev. Stat. Ann. §14:42 (1974). "Aggravated rape.

Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where the female resists the act to the utmost, but her resistance is overcome by force.

(2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.

(3) Where she is under the age of twelve years. Lack of knowledge of the female's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death."

La. Rev. Stat. Ann. §14:43 (1974). "Simple rape.

Simple rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

(1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced by an intoxicating narcotic or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.

(2) Where she submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

(3) Where she is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years."

La. Rev. Stat. Ann. §15:567 (1967). "Conditions precedent to execution; warrant of governor.

No person sentenced to death shall be executed until a certified copy of the indictment, verdict and sentence shall have been sent to the governor, and a warrant shall have been issued by him, under the seal of the state, directed to the warden of the Louisiana State Penitentiary at Angola, commanding the warden to cause the execution to be done on the person so condemned in all things according to the judgment against him, and upon the date named in said warrant."

La. Rev. Stat. Ann. §15:568 (1967). "Execution of death sentence; prior confinement of convict.

The warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, shall execute the criminal in conformity with the death warrant issued in the case. Until the time of his execution, the convict shall be kept in solitary confinement at the Louisiana State Penitentiary at Angola and no one shall be allowed access to him without an order of the court except the officers of the prison, his counsel, his physician, his spiritual adviser, his wife, children, father, mother, brothers and sisters."

La. Rev. Stat. Ann. §15:569 (1967). "Place for execution of death sentence; manner of execution.

Every sentence of death imposed in this state shall be by electrocution; that is, causing to pass through the body of the person convicted a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of the person convicted until such person is dead. Every sentence of death imposed in this state shall be executed at the Louisiana State Penitentiary at Angola. Every execution shall be made in a room entirely cut off from view of all except those permitted by law to be in said room."

La. Rev. Stat. Ann. §15:570 (1974 supp.). "Officials and witnesses present at execution; minors excluded.

Every execution of the death sentence shall take place in the presence of the warden of the Louisiana State Penitentiary at Angola, or a competent person selected by him, the coroner of the parish of West Feliciana, or his deputy, and a physician summoned by the warden of the Louisiana State Penitentiary at Angola, the operator of the electric chair who shall be a competent electrician who shall have not been previously convicted of a felony, a priest or minister of the gospel, if the convict so requests it, and not less than five nor more than seven other witnesses, all citizens of the State of Louisiana; no person under the age of eighteen years shall be allowed within said execution room during the time of execution."

La. Code Crim. Proc. Ann. art. 598 (1974 supp.). "Effect of verdict of lesser offense.

When a person is found guilty of a lesser degree of the offense charged, the verdict or judgment of the court is an acquittal of all greater offenses charged in the indictment and the defendant cannot thereafter be tried for those offenses on a new trial."

La. Code Crim. Proc. Ann. art. 803 (1967).
"Same [General charge; scope]; charge as to included minor offenses and plea of insanity.

When a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 or 815, the court shall charge the jury as to the law applicable to each offense . . . "

La. Code Crim. Proc. Ann. art. 809 (1967).
"Judge to give jury written list of responsive verdicts.

After charging the jury, the judge shall give the jury a written list of the verdicts responsive to each offense charged, with each separately stated. The list shall be taken into the jury room for use by the jury during its deliberation."

La. Code Crim. Proc. Ann. art. 814 (1974 supp.).
"Responsive verdicts; in particular.

A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are: . . .

8. Aggravated Rape:
Guilty.
Guilty of attempted aggravated rape.
Guilty of simple rape.
Not guilty . . . ."

La. Code Crim. Proc. Ann. art. 817 (1974 supp.)
"Qualifying verdicts.

Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, entered on June 10, 1974, affirming petitioner's conviction and death sentence. Petitioner, Terry Selman, a twenty-four-year-old white man, was sentenced to death on November 19, 1973, in the Sixth Judicial District Court, Parish of Madison, Louisiana, after being convicted of two counts of aggravated rape.

The State's evidence showed that at approximately 8:30 p.m., Saturday, September 1, 1973, Miss Nancy Falvey, a white seventeen-year-old, and her sister, Miss Cheryl Falvey, age fifteen, together with their dates, Wayne Girard, age eighteen, and Gerald Price, age sixteen, drove from Vicksburg, Mississippi, to a secluded sand bar on the Louisiana side of the Mississippi River. The Falvey sisters had met Girard and Price a week earlier and were on their first date with them. T. 173, 201 (Oct. 18-19, 1973). The two couples had brought blankets and an ice chest containing beer and malt liquor. After wading in the water and walking along the sand bar, the couples separated and began drinking and "petting" and became partially disrobed. Id. at 161, 165, 182, 188-189, 190, 350, 374. Both girls testified that they were virgins and that they did not have sexual intercourse with their dates on September 1, 1973. Id. at 165, 190. The couples met again at about 10:30 p.m., and at that time, according to Nancy Falvey:

> "Wayne asked Gerald to get him out a Schlitz Malt Liquor. So he got him out one and he was about to open it and everybody was quiet

and I was talking and I turned around and there was a man, and so he told us that he was a deputy, and so he said that we shouldn't have been out there because there was a wanted man out there and Gerald asked him what was he wanted for and he said I don't know, and he said, well was it murder and Wayne said, was it kidnap. And he said, I don't know. I'm kinda new and so he said if you'll want to you'll can just walk out in the bushes and wait until some red lights come by and then you'll can come back, and so we said no, we'll just leave, [162] and we started picking up our stuff and he said, well, wait a minute. I'll walk with you'll. So I was kinda scared, so I started walking fast and he said slow down. And so I turned around and he said move to the left and to the left there was bushes, and when I turned around I saw that he had his hands in his pockets, so it scared me, and then when we got in the bushes, he told the boys to put down the ice chest and so they did and he made them get down on their knees and he had already asked us before when he first came up what was our names and so he said he didn't believe it was Gerald because he thought he was somebody else, and he said I ought to kill you right now. You're lying. And he goes--no, I'm not and Wayne, said he wouldn't have any reason to lie to you. So then he made them get up and carry the ice chest further. So they did and he had me by the arm and he said if you'll try to make anything move [sic], I'll shoot her and so, they walked on, and then he made them put it down again and he told the boys to walk on to the waterfront and sit down and he said if they left that he would kill me and Cheryl, and so they did and he told me and Cheryl to start taking off our clothes. Then he [163] said no, no, wait a minute. He said go on further. So we went on further and then he told us to put down the stuff and we had the blankets with us. So we put down the blankets and then he told us to take off our clothes, so I started taking off my clothes and I said, do I have to. He said, no, you don't have to but I'll just kill you right now. So I went ahead and I took them off and he made me spread out the blanket, so I spread out the blanket and he made each one of us lay on opposite sides and then he made me suck him off and so I did and then he made Cheryl and then I

> think he went to Cheryl first and screwed her and then he came to me and screwed me, and then he went back to Cheryl and came back to me and did the same thing. Then he went back to Cheryl and he came back and he made me turn over and he did it that way and then he stuck it up my but [sic] and then he made Cheryl suck him off again and then he was over there for a long time and so he'd ask me questions and he'd try to make me answer them and I'd sit there for awhile and he'd start yanking on my hair and then he spit in my face and then he came back to me and I said, are you through? He said, I'll tell you when I'm through. So I said, alright. So then he lit up a cigarette and he asked us where we were [164] supposed to be and I said here and he said, are you sure about that, and I said I'm positive and he you'll [sic] know you'll are skinny, don't you and I said yes. And so he said do you'll know who I am and I said no and do you want to know who I am and I said if you want to tell us and he said remember my initials are M.B. and I work at Mississippi Hardware and so he said okay, now I want you'll to get up and I want you to walk out to where the boys are . . . . [S]o we got them [clothes] on and we ran out to where the boys were and we told them to stand up and we were there for a good while and I didn't hear anybody leave or anything and so then we walked back to the car."

Id. at 161-164. Cheryl Falvey, Wayne Girard, and Gerald Price, gave a similar account, although the two males did not witness the rape itself; they testified that they stood by the river's edge during this time, as they had been instructed. Id. at 236-237, 256. These four witnesses testified that their assailant was not in uniform and did not produce identification. Id. at 161, 192, 254-257. Their testimony was conflicting as to whether he stated that he had a gun.[1/] None of them saw any weapon

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1/ Girard, T. 244 (Oct. 18-19, 1973), and Price, id. at 263, testified that the assailant never told them he had a gun. Nancy Falvey testified that he did tell them he had a gun, id. at 167, and Cheryl Falvey gave similar testimony, id. at 192, 197. Nancy Falvey also testified that the man told her "he'd killed someone before and he wouldn't mind killing three other people if he had to." Id. at 167.

of any kind at any time. Id. at 179, 202, 238, 263. But he threatened to "shoot" the girls if the group did not cooperate with him, and at one point he thrust his hand into his pocket -- an act which led the party to think that he was carrying a firearm. Id. at 239, 256.

All four of these witnesses made an in-court identification of petitioner as the person who had raped the two girls, and each of them testified to selecting petitioner from a five-man line-up on September 4, 1973.[2/] Id. at 170, 199, 241-242, 259. A medical doctor who examined the girls on the early morning of September 2 testified that the vagina of each showed signs of irritation and "forceful entry," id. at 220, although he was unable to state that this condition was due to sexual intercourse. Another medical doctor testified that a vaginal saline wash taken during the medical examination

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2/ The two girls had reported to the police that the rapist said his initials were "M.B." and that he worked at the Mississippi Hardware store in Vicksburg. Nancy had also drawn a sketch of him. The Vicksburg police then went to the store and placed one Marty Beckham under arrest. Beckham was exhibited in a line-up with four other persons on September 3, but none of the four witnesses picked him out. After this line-up, the police talked to Beckham, and he showed them a wallet sized picture of petitioner, his brother-in-law. This picture was exhibited to the two girls, and they identified the person in it as their assailant. A line-up was then arranged for the following day, and petitioner testified that he came to the Vicksburg police station of his "own free will." T. 327 (Oct. 18-19, 1973). The four witnesses viewed him, one at a time, while he was in a line-up with four other men.

indicated the presence of several red blood cells due to hemorrhaging and of a large number of male spermatozoa in the specimen taken from Nancy Falvey. A large number of red blood cells but no male spermatozoa were present in the specimen taken from Cheryl Falvey. He was able to ascertain that the red blood cells were not due to menstruation. Id. at 230-232.

Petitioner presented a number of witnesses who testified concerning his general reputation and character, id. at 270-278, and his whereabouts on the night of September 1, 1973. Petitioner himself testified that he had been playing pool that evening with his father-in-law, brother-in-law and the local police chief at a road house approximately five minutes' drive from the sand bar. Id. at 282, 318-320. He had been drinking beer and drove down to the river to clear his head before returning to the home of his father-in-law, where he and his wife were staying. He got out of the car "to use the bathroom," id. at 320, when he saw two scantily clad girls and two boys back under the trees.[3/] One of the boys offered him a

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3 / Petitioner testified that after he had stopped his car, a young man came:

> "walking up there and I thought he had on a bathing suit, but I lit a cigarette and it wasn't a bathing suit, he was in his drawers, and he asked me--he hollered at me and I said "Yeah" and I walked on over there to where he was at and he said "Oh, I thought you was somebody else" and he said come on up and sit down and have a joint with us, which I took a joint to mean as a marijuana, so I walked out there and there was two girls sitting out there and another boy, but I thought it was

"joint" of marijuana, but he declined, warning them that "the

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3/ cont'd.

> three girls when I first walked up, but I found out later it was a boy and two girls, and they were sitting there, and the other boy had on a pair of shorts and the girls had on a pair of panties and a bra and that's all they had on, and I told them that I had just passed the law right back up the road there coming over in the levee--that they'd better watch sitting down here in the nude like that, [322] . . . . [T]he boy with the mustache asked me if--don't I know you and I said well, you might know me because I worked for two years at the Mississippi Hardware over there and I told them my name was [T]erry Selman and he said, yeah, I know you. He said I think--he asked me did I know Mike Conn. Mike Conn was my delivery boy when I worked over there and I told him yeah, I knew Mike. And we walked on back there and the girls had picked up their stuff and everything and he told them to bring it on closer to the trees. Well, the girls brought one of the blankets, the long haired girl, the one he called Nancey [sic], she brought the blanket up to the trees, but the other couple picked up the ice chest and another blanket and they never did come over there we was at . . . . And the girl told me -- the girls [sic] with the long--the one they called Nancey[sic] [323] told me that she would offer me a joint, but they had just run out, and she asked me did I want a beer and I said no, and she said well, is there anything else I can offer you, and I said naw, I don't guess, and this boy with the mustache--he got up and started over to where the other couple was at--well, the girl picked up and laid her arm on my shoulder and so I just figured well, and I went ahead and done what I done and I got up, but I never did take my britches down or nothing like that. I just unzipped my britches and I got up and I told the old boy--well, I'll see you later. I've got to go and get to the house and he said, well, come on and stick around a little longer. I'm expecting one of my friends down here later. He said he'll have some grass and I said, no, I said that's stuff--I can't even stand the smell of it. It makes my head hurt and I went on to my car and I went back to [the road house]."

T. 321-323 (Oct. 18-19, 1973). On cross examination, petitioner admitted that the Delta, Louisiana, Chief of Police, with whom

law" was patrolling the area. One couple and the second boy moved away while he continued talking to the girl called Nancy. She offered him a beer and then put her arm on his shoulder and they had sexual relations. Petitioner testified that the intercourse with Nancy was voluntary, and he denied having sexual relations with the other girl. He then returned alone to the road house.

At the conclusion of the evidence, petitioner's all-male jury[4/] was instructed that it could return verdicts of guilty of aggravated rape, attempted aggravated rape, simple rape, or not guilty. Id. at 391. The Court also informed the jury that "[w]hoever commits the crime of aggravated rape shall be punished by death."[5/] Id. at 388. The jury found petitioner guilty of two

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3/ cont'd.

he had been playing pool earlier in the evening, had told him about "wild parties" occurring on the sand bar, id. at 330. Petitioner also admitted that he had attended such parties, ibid., and that on several occasions he had met girls down there with whom he had "made out." Id. at 331.

4/ The Clerk of the Court testified that the parish jury commission had consciously excluded women from the general jury venire list since they were required by Louisiana law, see La. Code of Crim. Proc. Ann. art. 402 (1967), to file a written declaration of their desire to be subject to jury service. T. 3-4, 9-10 (Nov. 7, 1973). The Clerk testified that during the fourteen years of his service on the jury commission no woman had ever volunteered for jury duty. Id. at 12. He also testified that the September 4, 1973 general venire list, which supplied the panels from which petitioner's grand and petit jury were chosen, contained no women. Id. at 3.

5/ The jury was not death-qualified.

counts of aggravated rape, and the trial court sentenced him to death. T. 4 Nov. 19, 1973).

On June 10, 1974, the Supreme Court of Louisiana affirmed petitioner's convictions and death sentence, with two Justices dissenting on the ground that the death sentence was imposed in violation of Furman v. Georgia, 408 U.S. 238 (1972). A timely rehearing petition was denied on October 11, 1974, with two Justices dissenting.[6/]

6/ On December 23, 1974, Mr. Justice Powell granted an extension of time until February 23, 1975, in which to file a petition for certiorari. On January 14, 1975, the Supreme Court of Louisiana entered an order granting petitioner a stay of execution "pending further order of the Court to enable appellant to seek review of his conviction and sentence in the Supreme Court of the United States."

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. Petitioner's motion for a new trial and for arrest of judgment, which contended that his death sentence was in violation of the Eighth Amendment, T. 25 (Nov. 7, 1973), was denied by the trial court, id. at 26. Petitioner's Bill of Exception Number Six assigned this ruling as error, and he briefed the issue on appeal to the Louisiana Supreme Court, Brief of Appellant, State v. Selman, La. Sup. Ct. No. 54376, at 8. That Court rejected the claim on its merits, two Justices dissenting: "the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution." State v. Selman, 300 So.2d 467, 473 (La. 1974), App. A at 7a. The claim was raised again in petitioner's rehearing petition, Petition for Rehearing, State v. Selman, La. Sup. Ct. No. 54376, at 1-31, and this rehearing petition was denied without opinion, two Justices dissenting on October 11, 1974.

II. Petitioner's motion for a new trial and for arrest of judgment, which contended that women had been systematically excluded from the venire list used to provide the panel from which his petit jury was selected, T. 1-23 (Nov. 7, 1973), was denied by the trial court, id. at 24, 26. Petitioner's Bill of Exception Number Four assigned this ruling as error, and he briefed the issue on appeal to the Louisiana Supreme Court.

Brief of Appellant, State v. Selman, La. Sup. Ct. No. 54376, at 5-6. That Court rejected the claim on its merits: "[t]his Court has repeatedly rejected the contention that the exemption of women from jury service contained in Article VII, Section 41 of [the] Louisiana Constitution and Article 402 of the Code of Criminal Procedure violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution." State v. Selman, 300 So.2d 467, 471 (La. 1974), App. A at 5a. This claim was raised again in petitioner's rehearing petition, Petition for Rehearing, State v. Selman, La. Sup. Ct. No. 54376, at 32-36, and this rehearing petition was denied without opinion, two Justices dissenting, on October 11, 1974.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF AGGRAVATED RAPE UNDER THE LAW OF LOUISIANA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

On June 29, 1972, this Court held that the death penalty could no longer be imposed under statutory schemes which permit its arbitrary, rare, and irregular infliction. Furman v. Georgia, 408 U.S. 238 (1972).. The Louisiana legislature subsequently modified its capital procedures [7] by abolishing the power of

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7 / Eight statutes were enacted to revise Louisiana's capital punishment procedures after Furman:

(1) La. Acts 1973, Act 109 (amending La. Rev. Stat. Ann. §14:30 (1967)) defined the capital crime of first degree murder. Previously, Louisiana had not recognized degrees of murder;

(2) La. Acts 1973, Act 110 (amending La. Rev. Stat. Ann. §14:29 (1967)) divided "criminal homicide" into four grades: first degree murder, second degree murder, manslaughter, negligent homicide;

(3) La. Acts 1973, Act 111 (enacting La. Rev. Stat. Ann. §14:30.1 (1974)) defined a new non-capital crime of second degree murder;

(4) La. Acts 1973, Act 125 (amending La. Code Crim. Proc. Ann. art. 817 (1967) abolished the jury's power to qualify a capital verdict with the words "without capital punishment;"

(5) La. Acts 1973, Act 126 (amending La. Code Crim. Proc. Ann. art. 814 (1967)) defined the verdicts which would be "responsive" to a capital charge, omitting the verdicts "Guilty without capital punishment" in cases where a defendant is charged with first degree murder, aggravated rape, and aggravated kidnapping, and adding the verdict of "Guilty to second degree murder" in cases where a defendant is charged with first degree murder;

(6) La. Acts 1973, Act 127 (amending La. Rev. Stat. Ann. §14:31 (1967)) made a technical adjustment in the definition of manslaughter;

(7) La. Acts 1973, Act 133 (amending La. Code Crim. Proc. Ann. art. 598 (1967)) altered the article defining the effect of a verdict of conviction of a lesser offense by deleting the sentence: "When a jury returns a verdict of guilty without capital punishment, the defendant cannot thereafter on a new trial be sentenced to death;"

(8) La. Acts 1973, Act 134 (amending La. Code Crim. Proc. Ann. art. 557 (1967)) altered the article prohibiting guilty pleas to capital offenses by deleting the sentence: "The defendant,

the jury to make a recommendation of mercy when returning a capital verdict.[8] La. Acts 1973, Act. 125 (amending La. Code Crim. Proc. Ann. art. 817 (1967)).[9] Consistently with this

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7/ Cont'd.

with the consent of the district attorney, may plead 'guilty without capital punishment.'"

8/ This Court and the Supreme Court of Louisiana had vacated or reversed numerous death sentences imposed under the State's pre-Furman procedure. See, e.g., Sinclair v. Louisiana, 408 U.S. 939, on remand sub nom. State v. Sinclair, 263 La. 377, 268 So.2d 514 (1972); Poland v. Louisiana, 408 U.S. 936, on remand sub nom. State v. Poland, 263 La. 269, 268 So.2d 221 (1972); Singleton v. Louisiana, 408 U.S. 932, on remand sub nom. State v. Singleton, 263 La. 267, 269 So.2d 220 (1972); Williams v. Louisiana, 408 U.S. 934, on remand sub nom. State v. Williams, 263 La. 284, 268 So.2d 227 (1972); Square v. Louisiana, 408 U.S. 938, on remand sub nom. State v. Square, 263 La. 291, 268 So.2d 229 (1972); Douglas v. Louisiana, 408 U.S. 937, on remand sub nom. State v. Douglas, 263 La. 294, 268 So.2d 231 (1972); McAllister v. Louisiana, 408 U.S. 934, on remand sub nom. State v. McAllister, 263 La. 296, 268 So.2d 231 (1972); Strong v. Louisiana, 408 U.S. 937, on remand sub nom. State v. Strong, 263 La. 298, 268 So.2d 232 (1972); Marks v. Louisiana, 408 U.S. 933, on remand sub nom. State v. Marks, 263 La. 335, 268 So.2d 253 (1972); State v. Franklin, 263 La. 344, 268 So.2d 249 (1972); State v. Hayes, 271 So.2d 525 (La. 1973); State v. McCauley, 272 So.2d 335 (La. 1973); State v. Curry, 263 La. 997, 270 So.2d 484 (1972); State v. Jones, 263 La. 1012, 270 So.2d 489 (1972); State v. Refuge, 270 So.2d 842 (La. 1972); State v. Quinn, 288 So.2d 605 (La. 1974).

9/ At the time of Furman, article 817 provided:

> "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment' in which case the punishment shall be imprisonment at hard labor for life.
>
> In noncapital cases, any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

After the 1973 amendment, article 817, La. Code Crim. Proc. Ann. (1974 supp.) provides:

> "Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

modification, the legislature deleted the verdict "Guilty without capital punishment," see art. 814, La. Code Crim. Proc. Ann. (1967), as a 'responsive verdict" in cases where the jury is instructed on one of Louisiana's capital crimes.[10/] La. Acts 1973, Act 126 (amending art. 814). The effect of these and related amendments is to retain the following "responsive verdicts" upon which the jury must be instructed, see pp. 31-41, infra:

> On a first degree murder charge -- Guilty, Guilty of second degree murder, Guilty of manslaughter, Not guilty (art. 814(A)(1), La. Code Crim. Proc. Ann. (1974 supp.));
>
> On an aggravated rape charge -- Guilty, Guilty of attempted aggravated rape, Guilty of simple rape, Not guilty (art. 814 (A)(8), La. Code Crim. Proc. Ann. (1974 supp.));
>
> On an aggravated kidnapping charge -- Guilty, Guilty of simple kidnapping, Not guilty (art. 814(A)(16), La. Code Crim.Proc. Ann. (1974 supp.)).

Trial procedures in capital cases were not otherwise altered.

10/ In addition to the capital crimes of first degree murder (La. Rev. Stat. Ann. §14:30 (1974)), aggravated rape (La. Rev. Stat. Ann. §14:42 (1974)) and aggravated kidnapping (La. Rev. Stat. Ann. §14:44 (1974)), Louisiana provides a death penalty for the crime of treason:

> "Treason is the levying of war against the United States or the State of Louisiana, adhering to enemies of the United States or of the State of Louisiana, or giving such enemies aid and comfort.
>
> No person shall be convicted of treason except on the testimony of two witnesses to the same overt act, or on his own confession in open court.
>
> Whoever commits the crime of treason shall be punished by death."

La. Rev. Stat. Ann. §14:113 (1974). The crime of treason is not

Since petitioner was indicted on two counts of aggravated rape,[11] his jury was instructed, pursuant to art. 814(A)(8), that it could find him guilty of aggravated rape, guilty of simple rape, guilty of attempted aggravated rape, or not guilty. He was found guilty of aggravated rape on both counts, and a death sentence was imposed. On his appeal, the Louisiana Supreme Court considered the question of "whether the said [1973] amendments removed the infirmities in our law which precluded the imposition of the death penalty for aggravated rape in Louisiana since Furman v. Georgia. In other words, is the death penalty for aggravated rape presently constitutionally permissible?" State

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10/ cont'd.

one for which "responsive verdicts" are defined in art. 814, La. Code Crim. Proc. Ann. (1974 supp.). Louisiana Code of Criminal Procedure Annotated article 815 (1967) provides:

> "In all cases not provided for in Article 814, the following verdicts are responsive:
>
> (1) Guilty;
> (2) Guilty of a lesser and included grade of the offense even though the offense charged is a felony, and the lesser offense a misdemeanor; or
> (3) Not Guilty."

11/ Although the class of capitally punishable homicides was significantly narrowed by the 1973 Louisiana capital punishment legislation through the division of "murder" into two degrees, see note 7, supra, the definitions of aggravated rape, simple rape, and attempt, see pp.3-4, supra, were not altered in any way.

v. Selman, 300 So.2d 467, 472 (La. 1974), App. A at 6a. The Court answered this question -- with two Justices dissenting -- by ruling "that the death penalty for aggravated rape is not per se cruel and unusual punishment," ibid., and that the 1973 amendments removed the constitutional infirmities specifically condemned by Furman v. Georgia:

> "[a]s we read the various concurring opinions in . . . [Furman v. Georgia], we consider the primary objection to the death penalty was in its administration, wherein it left to the uncontrolled discretion of judges or juries the determination whether defendants committing certain crimes should die or be imprisoned. It was this uncontrolled discretion in the imposition of the death penalty by the judges or juries for a particular offense which created a violation of the Eighth and Fourteenth Amendments to the United States Constitution.
>
> . . . .
>
> [W]e find no substance in the argument that by permitting a jury to render responsive verdicts, there still remains in the jury the uncontrolled discretion to impose the death penalty. The responsive verdicts for aggravated rape are as follows: guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty. The reason for this argument lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude

> that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape."

State v. Selman, supra, 300 So.2d at 472-473, App. A at 6a-7a.

This decision presents issues of sober significance not only for petitioner and the over sixteen defendants[12/] thus far condemned under the 1973 Louisiana capital punishment legislation, but also for the viability of the constitutional principles applied in Furman. Certiorari is appropriate here to consider three distinct grounds upon which petitioner urges that his death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments.

12/ State v. Larry Calloway, Orleans Parish Dist. Ct., No. 244,393 (D) (November 14, 1974) (first degree murder); State v. Billy Monroe, Orleans Parish Dist. Ct., Nos. 243,325 & 243,326 (November 4, 1974) (aggravated rape); State v. Harry Roberts, Orleans Parish Dist. Ct. No. 241,775 (C) (September 19, 1971) (aggravated rape); State v. Robert Leonard, Orleans Parish Dist. Ct. No. 74,132 (July 18, 1974) (aggravated rape); State v. Lawrence Watts, St. Mary's Dist. Ct., No. 74,132 (July 15, 1974) (aggravated rape); State v. Herbert Nicholson, Orleans Parish Dist.Ct., No. 238,379, (June 28, 1974) (aggravated rape); State v. Charles Bryant, Ouachita Parish Dist. Ct., No. 36,038 (June 27, 1974) (aggravated rape); State v. Johnson Washington, St. Charles Parish Dist. Ct., No. 30,762 (February 7, 1974) (first degree murder); State v. Billy Dillard, East Carroll Parish Dist. Ct., No. 12,736 (February 23, 1971) (first degree murder); State v. Sheldon Batiste & Aaron Thomas, St. Landrey Parish Dist. Ct., No. 26852 (October 9, 1970) (first degree murder); State v. Eddy Foreman, East Baton Rouge Parish Dist. Ct., No. 65,685 (October 10, 1969) (first degree murder); State v. Roy Mejia, East Baton Rouge Parish Dist. Ct., No. 57,774 (November 2, 1967) (first degree murder); State v. Joseph Gleason, (received at Louisiana State Prison on October 21, 1974) (sentenced in Orleans Parish for aggravated rape); State v. Parnell Smith, (received at Louisiana State Prison on May 28, 1974) (sentenced in West Feliciana Parish for first degree murder); State v. Gregory England, (received at Louisiana State Prison on May 30, 1974) (sentenced in Jefferson Parish for first degree murder).

A. The Perpetuation of Arbitrary Selectivity under the New Louisiana Capital Punishment Procedure.

The decision of the Louisiana Supreme Court warrants review insofar as that Court held that Louisiana's 1973 statutory modifications satisfied the minimum requirement of Furman v. Georgia: that the penalty of death not be imposed arbitrarily.[13/] For numerous uncontrolled selective mechanisms continue to operate before, during and after the sentencing of defendants charged with capital crimes in Louisiana, combining to produce a wanton and irregular infliction of the most extreme penalty known to contemporary society with "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

13/ The questions presented by sections I(B) and I(C) of this petition, p. 44 infra, draw upon broader implications of the Furman decision than the minimum requirement of non-arbitrariness stated in the text here. As section I(A) demonstrates, however, Louisiana's present capital punishment procedure so clearly violates that minimum requirement as to render consideration of the broader implications of Furman unnecessary for the disposition of the case.

1. Prosecutorial Discretion

Article 61 of the Louisiana Code of Criminal Procedure Annotated (1967) provides that, subject to the limited supervision of the attorney general, "the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute." The Louisiana Supreme Court has reiterated that "[i]t is within the exclusive province of the district attorney, who is vested with full charge and control of every criminal prosecution instituted or pending in any parish where he is district attorney, to determine whom, when and how he shall prosecute." State v. Collins, 242 La. 704, 138 So.2d 546, 550 (1962). See also State v. Jourdain, 225 La. 1030, 74 So.2d 203, 204 (1954); Kemp v. Stanley, 204 La. 110, 15 So.2d 1, 20 (1943) (on rehearing); State ex rel. Bourg v. Marrero, 132 La. 109, 61 So. 136, 143-144 (1913); Pier 1 Imports, Inc. v. Pitcher, 270 So.2d 228, 229-230 (La. App. 1972). And in recognizing the unreviewable discretion of the district attorney to initiate civil nuisance abatement suits, the Louisiana Court of Appeals reasoned from the settled criminal jurisprudence of the State:

> "[i]n a civil action such as this, a district attorney certainly has no lesser latitude of discretion to determine when he shall bring the action to abate and to control the proceedings than in any criminal case. We do not agree with the contention of defendant's counsel that it was necessary that the legislature set forth 'any criterion or rules or standards under which the District Attorney will proceed."

Langridge v. Cassenberger, 183 So.2d 411, 413 (La. App. 1966). The decisions whether and when it is appropriate to seek and prosecute a capital aggravated rape indictment -- or whether and

when it is appropriate to proceed upon available lesser charges -- thus are committed to the unfettered discretion of the district attorney.

The district attorney also has unrestricted freedom to terminate criminal prosecutions. Article 691, of the Louisiana Code of Criminal Procedure Annotated (1967) provides:

> "[t]he district attorney has the power, in his discretion, to dismiss an indictment or a count in an indictment, and in order to exercise that power it is not necessary that he obtain consent of the court."

This broad power has been frequently recognized. The Louisiana Supreme Court has held, for example, that a trial judge has no power to require a district attorney to file a statement of reasons when he enters a nolle prosequi:

> "[t]here can be no doubt, of course, that the attorney general and the district attorneys of the State have absolute discretion to nolle prosequi any criminal case . . . [S]uch right has invariably been endorsed by the decisions of this Court. The broad powers vested in the district attorneys have long been recognized in our adjudications prior to the inclusion of . . . [Article 691] in our Code of Criminal Procedure . . . .'In all stages of a criminal prosecution before a jury is impanelled the prosecuting attorney has an arbitrary control over his indictments, and may enter a nolle prosequi as to them, at pleasure, without the consent of the court or of accused.'"

City of Lake Charles v. Anderson, 248 La. 787, 182 So.2d 70, 71 (1966) (quoting MARR, CRIMINAL JURISPRUDENCE OF LOUISIANA 804 (1906)).[14/] See also State v. Hingle, 242 La. 844, 139 So.2d 205,

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14/ If a jury has been impanelled, however, a district attorney must secure the consent of the defendant before he dismisses an indictment. State v. Bracklin, 113 La. 879, 37 So. 863 (1905).

206 (1962)(on rehearing); State v. Broussard, 217 La. 90, 46 So.2d 48, 50 (1950); State v. Kavanaugh, 203 La. 1, 13 So.2d 366, 373 (1943).

Thus, without any statutory guidance or judicial control, a district attorney is free to elect to charge aggravated rape or some lesser, non-capital offense on the same set of facts. This discretion is absolute and will inevitably result in an uncertain and inconsistent selection of defendants to be prosecuted on capital charges. As we demonstrate at pp.31-41, infra, the legal definitions setting off the capital crime from lesser ones are amorphous and opaque and their application to specific factual situations is (as the present case amply illustrates) largely conjectural. We have no doubt that some measure of charging discretion must always be left in a prosecutor's hands; but where the death penalty is a possible consequence of judgments made in the exercise of that discretion, the minimal requirement of the Eighth Amendment as construed in Furman should surely be that the State must take all practicable steps to control and regulate such judgments so as to assure against the arbitrary selection of some men to die while others in like factual circumstances are permitted to live. In Louisiana, there is absolutely no regularization of the prosecutor's selection among largely overlapping capital and non-capital charges, and a district attorney may act "arbitrarily" in an Eighth Amendment sense without violating any legal duty.

2. Plea Bargaining

Although art. 557 of the Louisiana Code of Criminal Procedure Annotated (1974 supp.) prohibits the entry of a guilty plea to a capital charge,[15/] article 558 (1967) provides that:

> "[t]he defendant, with the consent of the district attorney, may plead guilty of a lesser offense that is included in the offense charged in the indictment."

And article 487(B)(1974 supp.), enacted in 1970, allows a defendant to plead guilty to an even broader range of offenses in exchange for the dismissal of an indictment; it provides that the defendant may enter "a plea of guilty to a crime nonresponsive to the original indictment when such a plea is acceptable to the district attorney, and in such case, the district attorney shall not be required to file a new indictment to charge the crime to which the plea is offered." State v. Green, 269 So.2d 460 (La. 1972), construed articles 558 and 487(B) together to decree that a guilty plea is valid if it is voluntarily entered to a lesser offense "of the same generic class," 269 So.2d at 462, as that charged in the indictment, although the lesser crime is not one that would have to be submitted as a "responsive

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15/ Article 557 provides: "A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him."

verdict" under article 814 at a jury trial:

> "[t]he limitations on verdicts which may be applicable to a trial are not entirely pertinent to a guilty plea . . . Generally, no limitation is imposed on the guilty pleas which may be entered to a pending charge, except the requirement that the plea be to a lesser offense, and that the lesser included offense be of the same generic class, not requiring proof of any element not found in the major crime charged."

Id. at 463.

The Louisiana Supreme Court has also approved the practice of plea bargaining and has recognized that a "defendant may validly have entered a guilty plea, guilty or not, because of other considerations." State v. Riley, 284 So.2d 557, 558 (La. 1973). Although a district attorney must secure the agreement of the trial court to a sentencing bargain,[16/] he has unfettered power to charge-bargain -- that is, to agree to accept a guilty plea to a lesser offense. In the case of a defendant indicted for aggravated rape, the prosecutor may accept a plea to simple rape, attempted aggravated rape, or an assault charge. On the appeal of a defendant convicted of a narcotics violation, the Supreme Court of Louisiana ruled that the prosecutor was not obligated to have reduced the charge or to have offered appellant immunity simply because codefendants had received such treatment: "The matter of the prosecution of any criminal case is within the entire control of the district attorney . . . and the fact

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16/ "[A]greements made solely by a prosecuting attorney granting immunity from sentence or assurance concerning the extent of a sentence are unenforceable and do not bar subsequent action by the court. Such agreements gain vitality only when the judge becomes a party." State v. Hingle, 242 La. 844, 139 So.2d 205, 206 (1962) (on rehearing).

that not every law violator has been prosecuted is of no concern of appellant." State v. Jourdain, 225 La. 1030, 74 So.2d 203, 204-205 (1954).

The existence of plea bargaining is pervasive in the criminal justice system: guilty pleas are said to account for up to ninety per cent of all criminal convictions. 17/ Since the harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error, capital cases are particularly likely to involve plea bargaining:

> "'[s]ince time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court.'" 18/

17/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

18/ Bedau, Death Sentences in New Jersey 1907-1960, 19 RUTGERS L. REV. 1, 30 (1963) (quoting opinion of Judge C. Conrad Schneider, State v. Faison, No. 5-550-57, Bergen Cty. Ct., Nov. 21, 1958).

"A promise by the prosecutor of sentence leniency or a charge reduction as a concession for a plea of guilty is a major characteristic of the negotiated plea process." 19/ And an ostensibly "mandatory" death penalty statute is particularly likely to produce guilty pleas to lesser included offenses, since "[m]any prosecutors and judges . . . support the practice as both necessary and desirable . . . to achieve sentencing flexibility which would sometimes be prevented by mandatory sentences." 20/ Many prosecutors

> "declare without hesitation that one of their goals in the [plea] bargaining process is to nullify harsh, 'unrealistic' penalties that legislators have prescribed for certain crimes." 21/

Prosecutorial "nullification" of this sort is manifestly invited by the wide range of offenses which La. Rev. Stat. Ann. §14:42 (1974) describes as aggravated rape. See pp.31-41, infra.

It is inescapable, therefore, that in the absence of any standards or procedures which regularize the practices of district attorneys in accepting guilty pleas to lesser charges, some defendants indicted for aggravated rape will escape with sentences less harsh than death while others are eventually consigned to die for indistinguishable offenses upon unaccountable grounds.

19/ NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 29 (1966).

20/ Id. at 102.

21/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U.CHI. L. REV. 50, 54 (1966).

3. Jury Discretion

In each case where a trial judge instructs the jury on the capital crime of aggravated rape, he is also "required," State v. Broussard, 217 La. 90, 46 So.2d 48, 52 (1950), by La. Code Crim. Proc. Ann. art. 814(A)(8)(1974 supp.), to instruct on the non-capital crimes of attempted aggravated rape and simple rape. Thus, in every capital case, although the jury is no longer empowered to qualify its aggravated rape verdict with a recommendation of mercy, it may achieve the same result by simply convicting of one of the alternative non-capital crimes. Mr. Justice Barham, in his dissenting opinion below, forcefully stated the Eighth Amendment objection to such a procedure:

> "It may be concluded then that the minimum requirement under Furman is that the statutory scheme which establishes the death penalty must eliminate the discretionary imposition of the sentence so that discriminatory practices against certain groups of persons cannot occur.
>
> . . . .
>
> While the responsive verdicts provided for in the Code of Criminal Procedure have dispensed with one qualifying verdict 'guilty without capital punishment,' other qualifying verdicts remain responsive to a charge for 'capital' crimes. A defendant charged with aggravated rape may, under the present law, have one of four verdicts returned against him which would be responsive to that charge. If the jury returns a verdict of 'guilty,' the defendant suffers the death penalty. (La. R.S. 14:42). However, without accounting to anyone, the jury could return a verdict of 'guilty of attempted aggravated rape' and the defendant would be imprisoned at hard labor for not more than twenty years (La. R.S. 14:27); or the jury could return a verdict of 'guilty of simple rape,' and the defendant would be

imprisoned at hard labor for not less than one, nor more than twenty years (La. R.S. 14:43).

It is readily apparent that Louisiana does not have a 'mandatory death penalty' for a defendant charged with aggravated rape. The jury has a sliding scale for application of the penalty by returning a particular responsive verdict. The fact that the jury qualifies the verdict by classifying it as another offense makes no less real the total control left in the jury for deciding, upon any basis it chooses, whether one who has committed the crime of aggravated rape shall or shall not be sentenced to death. It is a common practice in this State, and I am sure throughout the nation, for juries to offer 'mercy' under certain charges by returning a verdict of 'guilty' to a lesser but included offense which is legally responsive to the charge for which the defendant was tried.

. . . .

I am of the firm opinion that Louisiana has not met the Furman standard of equal application of the death penalty in the case of aggravated rape.

. . . .

Our responsive verdict scheme cannot be applied to the death penalty for aggravated rape when juries are permitted to determine death or life for the same offense against different individuals without any standards and without any accounting.

. . . .

I can make no distinction between qualification of a single verdict which permits discretion as to death or imprisonment and a responsive verdict scheme which may be used to discretionarily accomplish discriminatory application of the death penalty."

State v. Selman, supra, 300 So.2d at 475-476, App. A at 10a-11a.

A majority of the Louisiana Supreme Court took a more mechanistic view of the matter. Conceding the unconstitutionality of a statute which left "to the uncontrolled discretion of the jury the determination whether the defendant committing a particular crime should die or be imprisoned," id. at 473, App. A at 8a, the majority distinguished Louisiana's responsive verdict scheme on the ground that thereunder "[t]he sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty . . . ." Ibid. But the necessity of the jury's finding a defendant guilty of a "particular" lesser crime in order to spare his life does not constrain its dispensing power in the slightest measure since (1) the lesser offenses must be charged in every case regardless of the evidence, (2) the elements which distinguish these offenses are amorphously defined, and (3) a conviction of a lesser offense which is "irrational" in terms of the evidence submitted at trial will not be reversed on appeal.

(1) At the request of the defendant, "the trial judge must instruct the jury as to all responsive verdicts regardless of the evidence adduced at trial."[22/] Such lesser-offense instructions are "mandatory", State v. Broussard, 217 La. 90, 46 So.2d 48, 53 (1950). Article 809 of the Louisiana Code of Criminal Procedure Annotated (1967) further provides that "[a]fter charging the jury, the judge shall give the jury a written

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22/ Bennett, Criminal Law and Procedure, 20 LA. L. REV. 326, 327 (1960) (emphasis in original).

list of the verdicts responsive to each offense charged, with each separately stated." Article 814, specifying the permissible responsive verdicts to each charge, was enacted to:

> "remov[e] the uncertainty theretofore involved in determining those offenses of less magnitude which were included within the offense charged. By setting out the permissible responsive verdicts, the article greatly simplified the preparation and scope of the charge. At the same time the result was that the accused could more definitely determine in advance the verdicts which could result from any given charge."

State v. Green, 263 La. 837, 269 So.2d 460, 463 (1972). In State v. Marshfield, 229 La. 55, 85 So.2d 28 (1956),[23/] the Court ruled that it was reversible error to refuse to instruct the jury on attempted possession of a narcotic drug, despite the fact that the information charged distinct acts of

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23/ Marshfield construed La. Rev. Stat. Ann. §15:386 (1954), which then provided that "the judge shall charge the jury the law applicable to all offenses of which the accused could be found guilty under the indictment." This provision now appears in revised form as La. Code Crim. Proc. Ann. art. 803 (1967): "[w]hen a count in an indictment sets out an offense which includes other offenses of which the accused could be found guilty under the provisions of Article 814 . . . ., the court shall charge the jury as to the law applicable to each offense." The revision does not appear to have changed the Marshfield rule, since Official Revision Comment (a) to article 803 declares, "[t]his article makes no change in the law."

possession. See also State v. Nicolosi, 228 La. 65, 81 So.2d 771 (1955); State v. Broadnax, 216 La. 1003, 45 So.2d 604 (1950); State v. Gueringer, 209 La. 118, 24 So.2d 284, 286 (1945). It is "the mandatory duty of the judge to charge the jury with the law applicable to all of the offenses of which the accused can be found guilty under the indictment," and "failure to do so constitutes reversible error." State v. Brown, 214 La. 18, 36 So.2d 624, 627 (1948).

(2) The distinction between aggravated and simple rape[24/] is extremely unclear. It is so unclear, indeed, that -- as applied to cases such as petitioner's -- it not merely permits but unavoidably requires the jury to exercise raw sentencing discretion under the guise of determining the crime of which the defendant is guilty. Aggravated rape is defined by La. Rev. Stat. Ann. §14:42 (1974) as:

> "a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
> (1) Where the female resists the act to the utmost, but her resistance is overcome by force.
> (2) Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution.
> (3) Where she is under the age of twelve years."

Simple rape is defined by La. Rev. Stat. Ann. §14:43 (1974) as:

> "a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:
> (1) Where she is incapable of resisting or of understanding the nature of the act, by reason of stupor or abnormal condition of the mind produced

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24/ Louisiana Revised Statutes Annotated §14:41 (1974) defines "rape" as

> "the act of sexual intercourse with a female person not the wife of, or judicially separated

> by an intoxicating, narcotic or anesthetic agent, administered by or with the privity of the offender; or when she has such incapacity, by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of her incapacity.
>
> (2) Where she submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.
>
> (3) Where she is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of her incapacity."

As §14:43 is construed by the Louisiana Supreme Court, fear or fright generated by force or threats amounts to an "abnormal state of mind, which is one of the ingredients of simple rape." State v. Miller, 237 La. 266, 111 So.2d 108, 114 (1959). So the essential elements of the simple rape offense are "always included within" an aggravated rape offense, ibid. And a jury may always find the lesser crime where it might find the greater. Because of the vagueness with which the term "resists the act to the utmost" has been defined, an aggravated rape conviction would often be supportable in a situation where there is only negligible resistance: "The words 'to the utmost' . . . do not necessarily mean that the resistance must continue up to the moment of the rape, but mean that the woman must show real resistance until she is either overcome by superior strength or compelled to stop resisting before the actual rape is committed by threats of bodily harm." State v. Jackson, 227 La. 642, 80

24/ cont'd.

> from bed and board from [sic], the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, however slight, is sufficient to complete the crime."

So.2d 105, 107 (1955). Moreover, there need be no resistance if there are "threats"; and the definition of "threats" is all-expansive:

> "the victim does not have to physically resist when she is prevented from resisting by her assailant where his actions are tantamount to threats which place her in fear of great bodily harm accompanied by apparent power of execution.
>
> . . . .
>
> [D]efense counsel were here attempting to have the jury instructed that aggravated rape could not be committed unless there was verbal or other specific communication of threats by the assailant to the victim, and the requested charge would imply that threats communicated by gestures or motions do not fall within the purview of Article 42 of our Criminal Code. This, of course is not the law for the threats need not be made verbally or through the exhibition of a dangerous weapon; they may be expressed or implied by the man's conduct toward the female, provided she is placed in such fear by the array of physical force that she dares not resist."

State v. Douglas, 256 La. 572, 237 So.2d 382, 386-387 (1970).

(3) In a pre-trial challenge to the constitutionality of Louisiana's post-Furman capital punishment procedures, the Louisiana Supreme Court held the responsive verdict scheme constitutional (in a homicide prosecution) because:

> "[t]he use of these lesser verdicts . . . is contingent upon the jury finding insufficient evidence to convict the defendant of first degree murder, with which he is charged. The jury is concerned only with guilt. It has no sentencing function."

State v. Hill, 297 So.2d 660, 662 (La. 1974) (emphasis added). However, this is a paper profession, unrelated to the realities of Louisiana practice. In practice, no restriction whatsoever is imposed upon the jury's power to find arbitrarily that some

defendants are guilty of less-than-capital offenses despite evidence showing only the capital crime. Rather, such arbitrariness is explicitly condoned by statute, and "irrational" verdicts to lesser offenses will be upheld on appeal.

Article 814(A)(8) of the Louisiana Code of Criminal Procedure Annotated (1974 supp.), provides that "Attempted Aggravated Rape," among other verdicts, is a responsive (and non-capital) verdict in an aggravated rape case."Attempt" is defined in La. Rev. Stat. Ann. §14:27 (1974).[25/] Paragraph C of the provision states clearly and unequivocally that "any person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime intended or attempted was actually perpetrated by such person in pursuance of such attempt." (Emphasis added.) Thus, a jury can lawfully find a defendant guilty of aggravated rape in one case and, in another case involving identical factual circumstances, afford mercy by finding him guilty of attempted aggravated rape.

A jury may also convict of simple rape despite the fact that the evidence unquestionably shows aggravated rape. In State v. Miller, 237 La. 266, 111 So.2d 108 (1959), a defendant had been indicted for aggravated rape and convicted

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25/ "Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended . . . ." (La. Rev. Stat. Ann. §14:27(A)(1974).)

of simple rape. He appealed on the ground that there was "not the slightest scintilla of evidence in the record pointing to or indicating any guilt on the part of the defendant of the crime of simple rape." 111 So.2d at 110. The Louisiana Supreme Court upheld the verdict on two distinct grounds. First, it found that the state of mind of the victim was "confused and abnormal," a constituent element of simple rape which had been induced by "fear of the defendant and his actions." Id. at 111. The Court held that the crime of aggravated rape "necessarily contains all of the elements of the crime of simple rape":

> "It is beyond human comprehension that anyone would not believe that a female faced by an attacker, who intends to commit the crime of rape upon her, is not immediately thrown into a state of great fear or an abnormal state of mind. This abnormal state of mind, which is one of the ingredients of simple rape, is, therefore, always included within the greater crime (aggravated rape)."
> 26/

Id. at 113-144. The other ground of the Miller decision

26/ The Court approved the following language of the trial judge:

> "Now, the argument that there is -- that the State depended upon force as outlined in the definition of aggravated rape is [sic] therefore precluded from applying the evidence adduced to support the charge of force, is precluded from applying that evidence to the definition of simple rape. I can't agree with that argument at all. In my honest opinion the District Attorney may start out to prove aggravated rape without any desire or intention of proving simple rape, confine his whole and total efforts, statements, argument and evidence to support the definition, the legal definition of aggravated rape. If there is in the evidence anything whatsoever brought out in the course of that trial that could be applied to any element of simple rape then regardless of what the District Attorney and the

guaranteed the discretionary power of the jury to render a simple rape verdict where the evidence tended to show aggravated rape: the Court quoted with approval the ruling of the trial judge that "the Jury is not required to give any reason for returning a verdict of simple rape under the indictment for aggravated rape." Id. at 112. Thus, there is absolutely no basis for assurance that a jury finding of simple rape rests

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26/ cont'd.

> State has announced its desire to do, the Jury has a perfect right to apply it to simple rape and not to aggravated rape, and when the Legislature said that the consent - the lack of consent - that the consent must be absent because of the abnormal condition of the female's mind, by specific reasons, stupor, intoxication, narcotics, anaesthetics, all of those things, and then says 'or from an abnormal condition of mind from any other cause' it just stands out like a sore thumb, that anything the accused does to throw the female into a state of confusion and abnormal condition of mind would bring it definitely under simple rape. Now, that's the only argument by which it could be brought under simple rape, and there may be slight room for argument that the female did not resist to the utmost, which she is required to do under the definition of aggravated rape, but in my humble opinion she did."

Id. at 113-114.

One commentator has asserted that "since a forcible attack by a rapist always produces fear and an abnormal condition of the mind, evidence of the forcible attack and resultant state of terror would support the verdict of simple rape." Note, Criminal Procedure--Simple Rape as a Responsive Verdict under an Indictment for Aggravated Rape, 20 LA. L. REV. 606, 609 (1960).

upon "insufficient evidence to convict" of aggravated, capital rape (cf. State v. Hall, supra), since the justification for the lesser finding need not be stated and will not be reviewed. Little wonder that defendants indicted for aggravated rape are frequently convicted of simple rape, see, e.g., State v. Washington, 272 So.2d 355 (La. 1973), or of attempted aggravated rape, see, e.g., State v. Bolden, 257 La. 60, 241 So.2d 490 (1970); State v. Smith, 259 La. 515, 250 So.2d 724 (1971); State v. Perrand, 210 La. 394, 27 So.2d 184 (1946).

The jury's power over the life of a defendant charged with aggravated rape is as unfettered as it was before Furman, because "without accounting to anyone," State v. Selman, supra, 300 So.2d at 476, App. A at 10a (dissenting opinion of Mr. Justice Barham), it may convict the defendant and spare him or kill him as it pleases. The three crimes submitted as "responsive verdicts" under Louisiana procedure differ in verbal formation and vary markedly in sentence, but these distinctions do not in any way hamper the jury's freedom to return a binding verdict of conviction of any of the three, if it determines that a defendant has had forcible intercourse with an unwilling partner. For practical purposes, the three crimes are interchangeable. The jury's choice among them is purely discretionary.

4. Executive Clemency

Article 5, section 10, of the Louisiana Constitution provides:

> "[T]he governor shall have power to grant reprieves for all offenses against the state; and may, except in cases of impeachment, or treason, upon the recommendation in writing of the lieutenant governor, attorney general, and presiding judge of the court before which the conviction was had, or any two of them, grant pardons, commute sentences, and remit fines and forfeitures. . . ."

The governor's discretion to spare the lives of condemned felons, upon proper recommendation, is nearly total.

> "The only limitation on the Governor's commutation power is that he act pursuant to a written recommendation of commutation signed by any two of the following: the lieutenant governor, the attorney general and the presiding judge of the court before which the conviction was obtained. Once this recommendation is received, the Governor has unlimited discretionary power to commute an applicant's sentence."

Gaillard v. Cronvich, 263 La. 750, 269 So.2d 231, 232 (1972). See also State v. Ramsey, 292 So.2d 708, 710 (La. 1974); State v. Mclering, 238 La. 847, 116 So.2d 689 (1959); State v. Trist, 238 La. 853, 116 So.2d 691, 697 (1950). And, of course, the discretion of the lieutenant governor, attorney general, and/or presiding judge to make or decline to make written recommendations is equally unbounded. The clemency process is effectively immune from judicial review.

The inevitable result of this Louisiana system of commutation is that an arbitrarily selected number of those convicted of like crimes will be put to death. The chief executive and

those who forward recommendations to him are bound by no criteria for deciding which among the condemned shall live or die. Their decisions are unexplained and inscrutable. Standards for reviewing clemency applications may vary greatly as officeholders are replaced -- or there may be no standards at all -- though life and death hang in the balance.

This analysis of Louisiana's post-Furman capital punishment procedures demonstrates that the arbitrary selectivity condemned in Furman has been perpetuated notwithstanding formal statutory amendments. Discretionary opportunities for imposition or avoidance of the death penalty are, in fact, as numerous and as unregulated as in the pre-June 29, 1972, period. A substantial question of literally vital importance to petitioner is thus presented by the Louisiana Supreme Court's affirmance of his death sentence under the new Louisiana statutory scheme.

B. The Excessiveness, Disproportionality, and Aberrancy of the Death Penalty for Aggravated Rape When the Crime Entails No Considerable Bodily Injury.

Even before Furman, the Court of Appeals for the Fourth Circuit had held that death is an excessive, disproportionate, and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury. See Ralph v. Warden, 438 F.2d 786, 793 (CA4 1970), cert. denied, 408 U.S. 942 (1972). For the reasons stated at pp. 19-22 of the Petition for a Writ of Certiorari in Noell v. North Carolina, No. 73-6876 (filed June 11, 1974) attached as Appendix B, infra, certiorari is appropriate here to consider whether the penalty of death for "aggravated" rape in the circumstances of this case violates the Eighth Amendment upon these grounds.

C. The Inconsistency of the Death Penalty with Contemporary Standards of Decency.

Finally, the manifestly significant question is presented whether the death penalty per se is inconsonant with contemporary standards of decency embodied in the Eighth Amendment. For the reasons stated in Part I-D of the Petition for a Writ of Certiorari in Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974), at pp. 45-51, attached as Appendix C, infra, petitioner also urges that certiorari be granted here to consider the consistency vel non of the penalty of death with those "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren).

II. THE INTENTIONAL SYSTEMATIC AND COMPLETE EXCLUSION OF WOMEN FROM THE GENERAL VENIRE LIST FROM WHICH PETITIONER'S PETIT JURY PANEL WAS DRAWN VIOLATED HIS RIGHTS UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Taylor v. Louisiana, 43 U.S.L.W. 4167 (Jan. 21, 1975), this Court applied the Sixth Amendment to invalidate the Louisiana procedure (La. Const. art. VII, §41 (1972) and La. Code Crim. Proc. Ann. art. 402 (1967)), whereby women were not selected for jury service unless they had previously filed a written declaration of their desire to serve. In Daniel v. Louisiana, 43 U.S.L.W. 3415 (Jan. 28, 1975), the Court declined to apply its Taylor decision retroactively (as a matter of federal law) to convictions obtained by juries empaneled prior to the date of that decision. The date of petitioner's conviction (October 19, 1973) therefore forecloses his Sixth Amendment attack on the systematic exclusion of women from his petit jury panel.

But it does not answer his Fourteenth Amendment claim regarding the arbitrary exclusion of all women from the general venire list of Madison Parish used at his trial. Prior to the term of court at which his case was tried, women had been added to the general venire list and regularly summoned for jury duty in the Parish. As petitioner's counsel emphasized:

> "Your honor, there's only one point I'd like to make on this motion for a re-hearing that the court may have overlooked . . . [T]his jury commission had made a point of including women on the jury . . . and in the previous general venire lists for a period of years, they had included women in the general venire list, and then they abruptly changed their pattern immediately prior to this trial."

T. 20 (Nov. 7, 1973).

At a hearing on petitioner's motion for a new trial, petitioner submitted evidence establishing that women had been systematically and completely excluded from the jury venire list which supplied the panels from which his grand and petit jury were selected. The parish Notary and Clerk of Court, an ex officio member of the jury commission, testified that the general venire list was composed "by various means," T. 2 (Nov. 7, 1973), including selection of names from the telephone book, from the personal knowledge of the jury commissioners, from voter lists, and from public utility records. Id. at 2-3. Panels were selected from this list by lot, and the persons whose names were drawn were instructed to report for jury duty. Although, of course, this method of composing the general venire list produced the names of a great many women, they were automatically "excluded," id. at 3, from the Sept. 4, 1973 general venire list used in petitioner's case, because of the Clerk's belief that women had to have on file a written application to serve. Ibid. No women remained on this general venire list and, of course, there were no women on the panels from which petitioner's grand and petit jury were selected. Id. at 3.

This practice of systematically excluding women from the general venire list was not explicitly sanctioned by art. 402, La. Code of Crim. Proc. Ann. (1967) which provides:

> "A woman shall not be selected for jury service unless she has previously filed with the clerk of court of the parish in which she resides a written declaration of her desire to be subject to jury service."

This article by its terms governs selection for service, and not the manner in which the master list of persons eligible to receive selection notices is prepared. Cf. State v. Womack, 283 So.2d 708, 710 (La. 1973). Indeed, the practice in Madison Parish had previously been to include some women on the general venire list and to notify them that they were to report for service if their names were drawn. The Clerk testified that this practice had been adopted a few years prior to petitioner's trial in response to a "federal" court decision:

> "I don't recall when the federal ruling took place but we all assumed the ladies would be included on the venire list and I don't recall at what specific time that the commission started doing this.
>
> . . . .
>
> I don't believe anybody instructed me [to include women on the general venire list] . . . . I read there again that the federal courts had ruled that eighteen year olds and that ladies could serve as jurors." 27/

Id. at 6, 11.

Shortly before the September 4, 1973 general venire list was prepared, the jury commission abandoned this practice of including women on the master list:

27/ The trial judge who ruled on petitioner's new trial motion indicated for the record that in the summer of 1972 he had instructed the members of the Madison Parish jury commission "'that there shall be no discrimination in the selection on account of sex. Thus the members of the jury commission shall commence planning now for women to be a representative part of the general venire.'" Id. at 22.

"Q. [defense counsel]: And women were excluded from this [Sept. 3, 1973] general venire list?

A. [Clerk]: Yes sir. On my belief that the Supreme Court [of Louisiana] had ruled that they had to file a written application.

Q. Was this -- how did the jury commission come about this information?

A. Well, it was in the paper. Specifically, I couldn't say.

. . . .

I believe that we took the ladies out of it [the general venire] due to the Supreme Court ruling.

Q. Do you know when you took the ladies out?

A. Well, it would have been the day we met.

Q. On the day you met?

A. Yes maam.

Q. How did you proceed? What was the mechanics for taking the ladies out?

A. Well, we keep a list of cards on each person's name and address on it and they are not subject to jury duty, but every three years we automatically go back to the previous jury -- when I say the previous jury, the three years prior to that -- and try to make sure that through some mistake we hadn't included somebody's name that had served, you know, within three years, and we just went through the cards and automatically took the ladies out of there.

Q. Now, who did that going through the cards?

A. Well, I'd say the jury commission as a whole.

Q. Did anybody in the Clerk's office do any of that work?

A. Yes maam. I had my secretary with me.

Q. Alright. Do you know which secretary did pull those cards?

A. Yes maam. It would be Carolyn Caldwell.

Q. Do you know why she pulled those cards?

A. On my instructions.

Q. From whom did you get your instructions?

A. I don't know that I got any, Miss Mulhearn. I had just read in the paper and I'd heard conversation that the Supreme Court had upheld the law saying that a lady had to apply to be a juror, so I assumed that we didn't need them in the jury venire box.

Q. Now where had you heard this conversation?

A. Well, I'd say among the attorneys. I believe -- I think Judge Morris --I believe I heard him say that they had overturned him in court, but as to the specifics of the hearing or the conversation, I just don't remember. I don't remember.

Q. Did you have any discussion with the local Judge on this subject?

A. I could have, Miss Mulhearn, but if I did, it escapes me. The only discussion I ever had with him on that is when he orders me to meet -- when I say meet, for the jury commission to meet.

Q. And you mean just on the basis of street talk and newspaper talk, you ordered your clerk to pull the women out of the jury box?

A. I remember specifically reading in the paper that the Supreme Court had upheld the ruling that the Louisiana law was constitutional. I also read that it probably would be a mute [sic] question later on because of the federal ruling, but at that time, as far as I was concerned, it was the rule and our law, so I did it. Yes maam.

Q. But previous to that, you had included them.

A. Yes maam."

Id. at 3-4, 9-11. At the term of court prior to the one for

which the Sept. 3, 1973, general venire list was prepared, a trial judge had excused all of the women who had been summoned as petit jurors. The Clerk testified that:

> "Judge Morris explained to each and every one of them that unless they had filed a written application that they would automatically be excused upon request and as I recall, I think every lady up there excused themselves."

Id. at 14.

Although petitioner was not constitutionally entitled under the Sixth Amendment to a jury selected from a panel which reflected a representative cross-section of the community (due to the adventitious timing of his trial), he did have a right under the Fourteenth Amendment to a jury from which half of Madison Parish had not been arbitrarily and systematically excluded. For, as this Court recognized in Taylor v. Louisiana, supra, 43 U.S.L.W. at 4170 n.12 (quoting Peters v. Kiff, 407 U.S. 493, 502 (1972) (opinion of Mr. Justice Marshall)):

> "'a State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.
>
> . . . .
>
> "But the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases.'"

"A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). Furthermore, systematic exclusion of any significant group on the basis of a constitutionally unsupportable distinction violates the Equal Protection Clause, Hernandez v. Texas, 347 U.S. 475, 478 (1954); and a criminal defendant need not be a member of the excluded group to contest the constitutionality of the exclusion. Peters v. Kiff, supra. See also Smith v. Texas, 311 U.S. 128, 130 (1940). Whatever the lingering vitality of the Hoyt v. Florida, 368 U.S. 57 (1961), doctrine that women who were homemakers were entitled to exemption from jury service, it was clear long before Taylor that the presumption that all women were automatically unfit for a legal duty was constitutionally invalid under the Fourteenth Amendment. Reed v. Reed, 404 U.S. 71 (1971). See also Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (opinion of Mr. Justice Brennan, announcing the judgment of the Court); Cleveland Board of Education v. LaFleur, __U.S.__, 39 L.Ed.2d 52 (1974). Moreover, as is clear from the transcript quoted above, Madison Parish officials had not relied on Hoyt v. Florida but had instead taken cognizance of such decisions as White v. Crook, 251 F.Supp. 401, 408-409 (M.D. Ala. 1966), and Healy v. Edwards, 363 F.Supp. 1110, 1113-1115 (E.D. La. 1973), and had recognized that art. 402, La. Code of Crim. Proc. Ann., did not prevent them from adding women to the general venire list (although presumably such women, when called, could rely on the exemption provided by art. 402). The Court should grant review to determine whether, in this context, their subsequent arbitrary and complete exclusion of women from the September 4, 1973 general venire list violated petitioner's rights under the Fourteenth Amendment.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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Appendix A

State v. Selman, ___La.____, 300 So.2d 467 (1974)

Board determined that the action taken against Odom was or was not for cause. It was not for political, religious or discriminatory reasons all agreed. Those grounds are surely not permissible causes. The true cause then, as the record shows, was the fact that there was not enough work for Odom; and the Mayor and Council could not justify his retention in the City's employ; that was the cause for the action taken against Odom. There was, therefore, both good faith and a cause for the action of the City.

The abolition of the position which occurred simultaneously with Odom's discharge was an effect, a result of the action against Odom, not the cause. Even if it should be concluded that the City attempted, improperly, to abolish the classification of fire inspector, that was not the cause of action against Odom.

To repeat, the "cause" of the action of the city of Minden against Odom was the lack of work and the inability of the responsible appointing authority to justify his retention on the payroll in the position of fire inspector. The action was taken in good faith and not for any reason reprobated by the constitution. Whether the City abolished the position of fire inspector or attempted, improperly, to abolish the classification has no bearing upon the inquiry the Board was authorized to make. Its function was confined to a determination of whether the action of the city of Minden was in good faith for cause.

In my view the City acted in good faith for cause. The Board, therefore, was properly reversed by the District Court on the Board's finding that the City acted illegally in abolishing the classification. That is to say, the District Court's authority was also "confined to the determination of whether the decision made by the board was made in good faith for cause." La. Const. Art. XIV, §15.1, par. 31.

There is no doubt that the Board acted in good faith. But, in finding that the City improperly abolished the classification, the Board gave a wrongful cause for its action. Its action should have been based upon whether or not the City had correctly concluded that there was no work for Odom and no justification for his retention in the position. A ground for reversal of the City's action by the Board would be a finding to the contrary—that there was ample work for Odom as a fire inspector and there was, in fact, justification for retaining him on the job, for his presence was needed for the proper function of the fire department.

For these reasons I respectfully dissent.

STATE of Louisiana

v.

Terry SELMAN.

No. 54370.

Supreme Court of Louisiana.

June 10, 1974.

Rehearing Denied Oct. 11, 1974.

The Sixth Judicial District Court, Parish of Madison, Cliff C. Adams, J., found defendant guilty on two counts of aggravated rape, sentenced him to death, and he appealed. The Supreme Court, Marcus, J., held that (1) defendant's requested charge that "Where the female yields because of the man's mere threat to arrest her if she refuses, he posing as a police officer, the act is not rape, nor is it rape where the threats are merely to abandon the female on the road after an automobile trip" was properly refused, where the testimony adduced at trial was that defendant threatened to shoot and kill, not merely arrest, the two victims, and where there was no evidence of an automobile trip, (2) death penalty for aggravated rape is not per se

cruel and unusual punishment and does not violate the Eighth Amendment to the United States Constitution, and (3) even assuming that the admittance of identifications were incorrectly admitted, where, according to the testimony of the victims, they spent enough time in an area sufficiently lighted to clearly see their assailant at the night of the crimes, where the circumstances [illegible] their assailant were such that their observation of him was well implanted in their memory, where they gave a full description to the police immediately thereafter, and where their dates, who also made in-court identifications of defendant, likewise had ample opportunity to observe him.

Conviction and sentence affirmed.

DIXON, J., dissented and was of the opinion that a rehearing should be granted.

BARHAM, J., dissented in part, with opinion and was of the opinion that a rehearing should be granted.

1. Criminal Law ⇐814(2)

Rape defendant's requested charge that "Where the female yields because of the man's mere threat to arrest her if she refuses, he posing as a police officer, the act is not rape, nor is it rape where the threats are merely to abandon the female on the road after an automobile trip" was properly refused, where the testimony adduced at trial was that defendant threatened to shoot and kill, not merely arrest, the victims, and where there was no evidence of an automobile trip. LSA-R.S. 14:42.

2. Criminal Law ⇐811(1)

Where defendant makes a request for special instructions to the jury, they must be such as are correct under the statement of facts as disclosed by the evidence. LSA-C.Cr.P. art. 807.

3. Criminal Law ⇐811(2)

Carnal knowledge of a juvenile is not a responsive verdict to charge of aggravated rape. LSA-R.S. 14:42.

4. Criminal Law ⇐829(1)

In rape prosecution, court properly refused defendant's requested instruction that "The charge of rape is one that is easily made but difficult to disprove, and for that reason the testimony of the prosecuting witness should be examined with caution," since the general charge included the burden of proof of the State and since the requested charge might well have been understood by the jury to be a comment on the evidence. LSA-C.Cr.P. art. 804.

5. Criminal Law ⇐1064(5)

Assertion, in support of motion for new trial, that the verdict is contrary to the law and evidence presents nothing for review.

6. Criminal Law ⇐635(2)

Defendant was not entitled to a new trial on the basis of his claim that the State, in rape prosecution, failed to prove any apparent force or resistance or that defendant had any weapon or method of carrying out his threats, where the victims testified that defendant said he had a gun, that he made numerous threats to kill them unless they submitted, and that they were in fear of great and immediate bodily harm, accompanied by apparent power of execution by the defendant. LSA-R.S. 14:42.

7. Constitutional Law ⇐224, 267

Exemption of women from jury service does not violate the due process and equal protection clauses of the Fourteenth Amendment. LSA-Const. art. 7, § 41; LSA-C.Cr.P. art. 402; U.S.C.A.Const. Amend. 14.

8. Courts ⇐97(1)

Decisions of lower federal courts are not binding upon state courts.

9. Criminal Law ⇐1213

Death penalty for aggravated rape is not per se cruel and unusual punishment and does not violate the Eighth Amendment to the United States Constitution. LSA-R.S. 14:42; U.S.C.A.Const. Amend. 8.

10. Criminal Law ⇐776

Fact that the jury, in a rape prosecution, is permitted to affix responsive verdicts does not mean that the jury has uncontrolled discretion to impose the death penalty. LSA-R.S. 14:42, LSA-C.Cr.P. arts. 814, 817.

11. Rape ⇐64, 15

Attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions. LSA-R.S. 14:42.

12. Rape ⇐64

There is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape. LSA-R.S. 14:42, LSA-C.Cr.P. arts. 814, 817.

13. Criminal Law ⇐339

Even assuming that the pretrial identifications of defendant were tainted, the in-court identifications were properly admitted, where, according to the testimony of rape victims, they spent enough time in an area sufficiently lighted to clearly see their assailant on the night of the crimes, where the circumstances under which they confronted their assailant were such that their observation of him was well implanted in their memory, where they gave a full description to the police immediately thereafter, and where their dates, who also made in-court identifications of defendant, likewise had ample opportunity to observe him.

14. Criminal Law ⇐1169.3

Where defendant in rape prosecution admitted being with the victims on the night in question and admitted having intercourse with one of them, his claim of tainted pretrial identifications was not a viable one.

LeRoy Smith, Jr., Mulhearn & Smith, Tallulah, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Thompson L. Clarke, Dist. Atty., John T. Seale, Asst. Dist. Atty., J. J. McKenzie, Mitchell B. Landon, Special Counsel to Atty. Gen., Baton Rouge, for plaintiff-appellee.

MARCUS, Justice.

Defendant was charged with having committed aggravated rape upon Nancy Falvey, age seventeen, and Cheryl Falvey, age sixteen, between 10 p. m. and 12 midnight on September 1, 1973. He was tried, found guilty and sentenced to death. His appeal seeks reversal of the conviction and sentence.

The two victims and their dates, Gerald Price and Wallis DeWayne Girard, were on a sandbar at Delta, Louisiana, when they were approached by defendant Terry Selman who claimed to be a deputy sheriff. He represented that he had a gun and ordered the boys to stay by the edge of the water while he took the girls into some bushes, ordered them to disrobe and there raped them. According to the testimony of the victims and their dates, the defendant threatened to shoot and kill the girls unless they submitted.

Bills of Exceptions Nos. 1, 2 and 3 concern requested special charges which were refused by the trial judge.

[1] The first of these requested charges (Bill of Exceptions No. 1) is as follows:

"Where the female yields because of the man's mere threat to arrest her if she refuses, he posing as a police officer, the act is not rape, nor is it rape where the threats are merely to abandon the female on the road after an automobile trip."

The accused claims that there was some testimony adduced at the trial which indicated that he posed as a police officer. Thus, it is contended that in order for the jurors to be totally confident that the mere posing as a police officer was not a suffi-

cient threat to constitute rape, the charge was unnecessary.

[2] This charge was properly refused because it was not consistent with the testimony adduced at trial which was that the accused threatened to shoot and kill, not merely arrest, the victims. Furthermore, there was no evidence of an automobile trip. Where the defendant makes a request for special instructions to the jury, they must be such as are correct under the statement of facts disclosed by the evidence. State v. Ross, 222 La. 69, 62 So.2d 11 (1952). Thus, Article 807 C.Cr.P., a special charge should be given by the court if it does not require qualification, limitation, or explanation and if it is wholly correct and pertinent.

The next requested charge (Bill of Exceptions No. 2) which was refused is:

"If you find that the defendant has been guilty of carnal knowledge with the consent of the accusing parties, that you will have to acquit the defendant."

[3] This charge was likewise properly refused by the trial judge, as carnal knowledge of a juvenile is not a responsive verdict to the charge of aggravated rape. The trial judge correctly stated that such a charge would only be confusing to the jury. Furthermore, the issue of consent was covered in the general charge.

[4] The third requested charge (Bill of Exceptions No. 3) recites:

"The charge of rape is one that is easily made but difficult to disprove, and for that reason the testimony of the prosecution witnesses should be examined with caution."

A refusal to give this charge was proper. The general charge included the burden of proof of the State. The requested charge might well be understood by the jury to be a comment on the evidence which is prohibited by Article 810 C.Cr.P.

Bills of Exceptions Nos. 1, 2 and 3 are without merit.

Bill of Exceptions No. 4 was reserved to the trial court's refusal to grant a new trial.

Two grounds are urged as the bases for the granting of this motion. The first of these is:

"The verdict is contrary to the law and the evidence in that the State failed to prove beyond any reasonable doubt any apparent force, or any resistance whatsoever. There was no evidence introduced at the trial that Defendant had any weapon or any method of carrying out his threats."

[5,6] This contention is wholly without merit. The assertion that the verdict is contrary to the law and evidence presents nothing for review. Furthermore, the claimed failure of the State to prove any apparent force or resistance or that defendant had any weapon or method of carrying out his threats is without basis.

Aggravated rape (R.S. 14:42) is defined in pertinent part as follows:

"Aggravated rape is a rape committed where the sexual intercourse is deemed to be without the lawful consent of the female because it is committed under any one or more of the following circumstances:

* * * * * *

"(2). Where she is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution."

There is ample evidence by the testimony of the victims that the accused stated he had a gun in his pocket and that he made numerous threats to kill them unless they submitted. The victims were in fear of great and immediate bodily harm, accompanied by apparent power of execution by the accused.

The fourth ground advanced in this motion for a new trial is:

"The names of women jurors on the general venire list were removed after the jury was drawn, and that new names were placed in their place. That notwithstanding the exercise of reasonable diligence by the Defendant, [this] was not discovered before the verdict or judgment."

[7, 8] This ground is without merit. The exemption of women from jury service has been upheld in Hoyt v. Florida, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961). This Court has repeatedly rejected the contention that the exemption of women from jury service contained in Article VII, Section 41 of Louisiana Constitution and Article 402 of the Code of Criminal Procedure violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. We recognize that in Healy v. Edwards, 363 F.Supp. 1110 (1973), the United States District Court for the Eastern District of Louisiana declined to follow the Hoyt decision. However, decisions of lower federal courts are not binding upon state courts. Hence, we will continue to adhere to the last authoritative expression of the United States Supreme Court in Hoyt v. Florida, supra, until that court decides this issue to the contrary.

Bill of Exceptions No. 4 lacks merit.

Bill of Exceptions No. 5 was taken to the denial of a motion in arrest of judgment. The only ground briefed in this Court is that: "The verdict is so defective that it will not form the basis of a valid judgment." It is contended under this ground that the removal of women from the jury list made the whole proceedings so defective that there could be no valid verdict. This contention is answered by the reasons assigned in Bill No. 4 regarding the service of women on a jury.

Bill of Exceptions No. 6 was reserved to the imposition of the death sentence.

Defendant's objection is not that the death penalty per se is unconstitutional, but that the imposition of the death penalty in this case would be cruel and unusual punishment. He urges here only that the imposition of the death penalty in this case, where the life of no one was placed in jeopardy or no violent battery occurred, would amount to cruel and unusual punishment.

R.S. 14:42 defining aggravated rape provides the following penalty:

"Whoever commits the crime of aggravated rape shall be punished by death."

Since the advent of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Louisiana legislature, during the 1973 regular session, enacted amendments to Articles 811 and 817 of the Code of Criminal Procedure. Act 125 of 1973, effective July 2, 1973, amending Article 817 C.Cr.P. relative to qualifying verdicts provides:

"Art. 817. Qualifying verdicts

"Any qualification of or addition to a verdict of guilty, beyond a specification of the offense as to which the verdict is found, is without effect upon the finding."

Act 126 of 1973, effective July 2, 1973, amending Article 814 C.Cr.P. relative to responsive verdicts in pertinent part provides:

"Art. 814. Responsive verdicts; in particular

"A. The only responsive verdicts which may be rendered where the indictment charges the following offenses are:

"8. Aggravated Rape:

• • • • • •

"Guilty.

"Guilty of attempted aggravated rape.

"Guilty of simple rape.

"Not guilty."

Since the alleged crime of aggravated rape occurred on September 1, 1973, the above amendments to the law are applicable in the instant case.

The only issue presented in this bill is whether the 1973 amendments removed the infirmities in our law which precluded the imposition of the death penalty for aggravated rape in Louisiana since Furman v. Georgia. In other words, is the death penalty for an aggravated rape presently constitutionally permissible?

First, in State v. Mye, 261 La. 1013, 257 So.2d 37 (1972), we stated that the court has consistently rejected the contention that the death penalty for aggravated rape constitutes cruel and unusual punishment where the victim's life was neither taken nor endangered. Therein, we cited State v. Williams, 255 La. 70, 229 So.2d 706 (1969) and State ex rel. Barksdale v. Dees, 252 La. 434, 211 So.2d 318 (1968). See also State v. Crook, 253 La. 901, 221 So.2d 473 (1969). In State v. Crook, supra, we stated:

"Since the Legislature is vested with the constitutional power to define crimes and fix punishments, this Court is concerned only with the constitutionality of the death penalty for aggravated rape. More specifically, we must determine whether the death penalty for such a crime is proscribed by the Eighth and Fourteenth Amendments of the United States Constitution.

"The Eighth Amendment provides:

"'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'

"Cruel and unusual punishments are those that are barbarous extraordinary, or grossly disproportionate to the offense. In short, the constitutional prohibition is directed to punishments that shock the conscience of civilized men.

* * * * * *

"Aggravated rape is a grave offense. The authorization of capital punishment for rape, as we have observed, is not unusual in the United States. Such punishment is neither bizarre nor extraordinary. Nor do we appraise it as grossly disproportionate to the crime. * * *"

[9] We recognize that this pronouncement was made prior to the Furman case; however, it is just as correct and viable today as it was then. Hence, we conclude that the death penalty for aggravated rape is not per se cruel and unusual punishment.

Furthermore, the fact that second degree murder provides for a penalty of life imprisonment at hard labor without benefit of parole, probation or suspension of sentence for a period of twenty years whereas aggravated rape imposes the death penalty does not constitute, in our opinion, cruel and unusual punishment. Aggravated rape has long been considered a capital crime in this State and one punishable by death. It is a serious offense with serious consequences. As stated in State v. Crook, the legislature is vested with the constitutional power to define crimes and fix punishments. We cannot say that a sentence is unconstitutional simply because this Court might feel that the crime of aggravated rape is less serious than second degree murder but yet carries a more severe penalty. Both are serious offenses. Any change in the penalty provisions addresses itself to the legislature. We can only look at the particular offense involved in order to determine whether the penalty imposed for its violation constitutes cruel and unusual punishment. In doing so in this case, we conclude, as we have held many times before, that the death penalty for aggravated rape is not cruel and unusual punishment and thus does not violate the Eighth Amendment to the United States Constitution.

We also feel that the amendments to Articles 814 and 817 of the Code of Criminal Procedure removed the infirmities pronounced in Furman v. Georgia. As we read the various concurring opinions in that case, we consider the primary objec-

tion to the death penalty was in its administration, wherein it left to the uncontrolled discretion of judges or juries the determination whether defendants committing certain crimes should die or be imprisoned. It was this uncontrolled discretion in the imposition of the death penalty by the judges or juries for a particular crime which created a violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Prior to these enactments, our law provided that in a capital case, the jury could qualify its verdict of guilty with the additional words "without capital punishment," in which case the punishment would have been imprisonment at hard labor for life rather than death. This clearly left to the uncontrolled discretion of the jury the determination whether the defendant committing a particular capital crime should die or be imprisoned. Act 123 of 1973, amending Article 817 of our Code of Criminal Procedure, prohibits any qualification to a verdict of guilty. Act 120 of 1973, amending Article 814 C.Cr.P. removed from responsive verdicts in capital cases: "guilty without capital punishment." We feel that the Louisiana legislature, by amending Articles 817 and 814 C.Cr.P., as aforesaid, removed the infirmity which caused the reversal of the convictions in Furman v. Georgia.

[10-12] Finally, we find no substance in the argument that by permitting a jury to render responsive verdicts, there still remains in the jury the uncontrolled discretion to impose the death penalty. The responsive verdicts for aggravated rape are as follows: guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty. The reason for this argument lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. If the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape.

Hence, the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution.

Bill of Exceptions No. 6 is without merit.

Bill of Exceptions No. 7 was taken to the trial court's refusal to grant defendant's motion to suppress the in-court identifications of the defendant by the victims and their dates.

Objection is made that a single photograph, that of the defendant, was exhibited to Cheryl and Nancy Falvey, the victims, by Deputy Wayne Deckard and Lt. Hearn. Following this, the girls and their dates viewed a lineup in which they identified the defendant. Further objection is made to the method of composition of the lineup, it being urged that the defendant was in dirty work clothes, whereas the other persons appearing in the lineup were in ordinary work clothes.

The contention is that the pre-trial photographic and lineup identifications tainted the in-court identifications to such a degree that the in-court identifications were legally impermissible.

This bill is without merit for several reasons. It is established in the record that the defendant's identification resulted from the following facts: immediately following the alleged rape, all four witnesses proceeded to the police station to report the crime. A description of the assailant was given to the police and a sketch was drawn up according to this description. The victims testified that their assailant told them that his initials were M. E. and that he worked at Mississippi Hardware Company. Based on this information, the police picked up one Marty Beckman, an employee of Mississippi Hardware. Beckman was placed in a lineup, but none of the four witnesses identified Beckman. Further questioning of Beckman by the police determined that he had a brother-in-law who resembled the sketch made from the victim's description. Beckman provided the police with a photograph of the defendant, and the two victims were shown this photograph. Each positively identified the man in the photograph as the rapist.

The following day, defendant voluntarily surrendered. In a lineup conducted with the defendant and four other subjects of generally similar age and appearance, he was identified by the two victims and their dates who were with them on the night of the crime.

[13] Even were we to assume that the pre-trial identifications were tainted, the in-court identifications were properly admitted. As stated recently by this Court in State v. Moseley, 284 So.2d 749 (La.1973):

"While the practice of showing a suspect singly to persons for the purpose of identification, and not as a part of a lineup, is not favored, a claimed violation of confrontation depends on the totality of the circumstances surrounding it. Neil v. Biggers, 409 U.S. 188, 93 S. Ct. 375, 34 L.Ed.2d 401 (1972); Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). Therefore, even if the out-of court identification was tainted, if the in-court identification had a source independent of the out-of-court identification, the in-court identification does not violate defendant's due process rights. State v. Newman, No. 53,422 on the docket of this Court handed down on September 24, 1973, 283 So.2d 756; State v. Amphy, 259 La. 161, 249 So.2d 563 (1971); State v. Richey, 258 La. 1094, 249 So.2d 143 (1971); United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L. Ed.2d 1149 (1967).

"We stated in State v. Newman, supra, that a determination of whether the witness' in-court identification was based upon an independent source involves these factors: (1) the prior acquaintance of the witness with the accused; (2) length of time the witness observed the perpetrator before, during and after commission of the offense; (3) the circumstances under which the observation was made. This would include illumination at the scene, the physical capacities of the witness and the emotional state the witness was in at the time of observation."

According to the testimony of the victims, they spent enough time in an area sufficiently lighted to clearly see their assailant on the night of the crime. Furthermore, the circumstances under which they confronted the accused were such that their observation of him was well implanted in their memory. They gave a full description to the police immediately thereafter, and one of the victims made a sketch of the defendant. Their dates likewise had ample opportunity to observe the accused at the scene of the crime. Thus, the in-court identifications by these witnesses had an independent basis sufficient for their introduction.

[14] Furthermore, it is questionable whether defendant may raise this issue for he took the stand at trial and admitted his presence at the scene of the crime. It would seem that, because he admitted being

with the victims on the night in question and admitted having intercourse with one, the contention of tainted pretrial identifications is not a viable one.

Bill of Exceptions No. 7 lacks merit.

For the reasons assigned, the convicting and sentence are affirmed.

DIXON, J., dissents.

BARHAM, J., dissents and assigns reasons.

BARHAM, Justice (dissenting.)

I respectfully dissent from the majority's holding that the imposition of the death sentence is constitutional under Louisiana's present scheme for providing death as a penalty for aggravated rape. Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), struck down the death penalty as it then existed in Louisiana. We have followed the holding in Furman repeatedly by ordering trial courts to resentence to life imprisonment defendants formerly sentenced to death. The per curiam opinion which precedes the separate opinions filed by all nine members of the Court states:

"* * * The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. * * *." 408 U.S. at 239, 92 S.Ct. at 2727.

The majority of five who arrived at that conclusion consisted of Justices Douglas, Brennan, Stewart, White and Marshall. Mr. Justice Brennan and Mr. Justice Marshall found that the death penalty was cruel and unusual punishment per se. Mr. Justice Douglas pretermitted that question. Mr. Justice Stewart and Mr. Justice White limited their determination of cruel and unusual punishment to the death sentences before them because of the discriminatory manner in which those sentences were imposed. Of course, Mr. Justice Douglas also premised his holding on the discriminatory application of the sentence. He stated:

"* * * Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach." 408 U.S. at 257, 92 S.Ct. at 2736.

It may be concluded then that the minimum requirement under Furman is that the statutory scheme which establishes the death penalty must eliminate the discretionary imposition of the sentence so that discriminatory practices against certain groups of persons cannot occur.

I examine the death penalty imposed in this case under our total statutory scheme for meting out that penalty. In 1973 the Louisiana Legislature revised La.Revised Statutes 14:24, 14:30, 14:30.1 and 14:31 to re-define homicide, first degree murder, second degree murder and manslaughter. The death penalty was retained for that class of killings which was defined as first degree murder (La.R.S. 14:30). All other homicides constituted either second degree murder (La.R.S. 14:30.1) which carries a sentence of life imprisonment, or manslaughter (La.R.S. 14:31), which carries imprisonment up to twenty-one years.

In an attempt to avoid the "unequal application" holding of Furman, the legislature amended La.C.Cr.P. Articles 814 and 817. The responsive verdicts to first degree murder dispensed with the former responsive verdict, "guilty without capital punishment." Responsive verdicts provided for aggravated rape also dispensed with the former qualifying verdict of "guilty without capital punishment." C.Cr.P. Art. 817, which had formerly provided that in a capital case a jury may qualify its verdict of guilty with the addition of the words, "without capital punishment," was amended to read:

"Any qualification of or addition to a verdict of guilty, beyond a specification

of the offense as to which the verdict is found, is without effect upon the finality [illegible]

[illegible] jury has found that these aggravating circumstances [illegible] Louisiana statutory scheme for capital punishment [illegible] [illegible] that the death [illegible] [illegible] [illegible]

tion of judge or jury, and the death sentence is imposed with great infrequency. Mr. Justice White posed the question of whether imposition of the death penalty in such circumstances would violate the Eighth Amendment and concluded:

"* * * It is my view that it would, * * *." 408 U.S. at 312, 92 S.Ct. at 2760.

I can make no distinction between qualification of a statute which permits discretion as to death or imprisonment and a responsive verdict scheme which may be used to discretionarily accomplish discriminatory application of the death penalty.

With the knowledge that two of the majority in Furman believe the death penalty to be unconstitutional per se, and the knowledge that three of the majority require that the imposition of the sentence be mandatory and not left to the discretion of judge or jury, it seems to me that the United States Supreme Court would find our scheme of qualifying or responsive verdicts to aggravated rape an unconstitutional imposition of the death penalty.

I move to a further consideration of whether or not the present death penalty for aggravated rape is cruel and unusual punishment. Almost all of the opinions in Furman recognize that for many years the United States Supreme Court has examined the cruel and unusual punishment prohibition of the Eighth Amendment under the criterion of whether the punishments, by their excessive lengths or severity, are greatly disproportionate to the offenses charged. Mr. Justice Field first laid down this test in O'Neil v. Vermont, 144 U.S. 323, 12 S.Ct. 693, 36 L.Ed. 450 (1892). It is true Mr. Justice Field was dissenting, joined by Mr. Justice Harlan and Mr. Justice Brewer, but the majority did not reach that issue at all in O'Neil because of its finding that at that time the Eighth Amendment was only a federal restriction and that states were not regulated by its prohibition.

In Weems v. United States, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), the Court held a section of the Philippine penal code unconstitutional as violative of the Eighth Amendment prohibition against cruel and unusual punishment because "* * * it is a precept of justice that punishment for crime should be graduated and proportioned to offense." In Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), the Court said that the words of the Eighth Amendment were not static but that "* * * [t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. * * *" 356 U.S. at 101, 78 S.Ct. at 598. In Trop, the Court held that de-nationalization for wartime desertion was cruel and unusual punishment.

The legislature, in creating the crimes of first and second degree murder, has provided the death penalty for an offender who has killed a human being while engaged in the perpetration or attempted perpetration of aggravated rape. The majority's application of the death penalty to aggravated rape, when death is not a consequence of that criminal act, invites one who commits rape to kill the victim. There are two reasons why such a legal scheme will invite murder: (1) the penalty is no more severe if the rape victim is killed; and (2) a dead victim cannot identify the offender. Most rape convictions are based on one-on-one identifications. The only witness is usually the victim. It is illogical to subject one who rapes without any intent to kill or inflict great bodily harm, and who in fact has not endangered the life of the rape victim, to the same penalty as one who intentionally kills the victim after the rape.

A review of the entire record in this case justifies a reasonable inference that the defendant was actually unarmed. All witnesses testified that any coercion exerted by the defendant resulted from the defendant's hand (or hands) being in his pocket (or pockets), coupled with his threat to use a gun if the victims and their boyfriends did not respond to his orders.

No gun was ever exhibited. The two females were not known or [illegible] and at [illegible] it was impossible for the complainant to commit the act of copulation with both females at the same time by sole [illegible] While [illegible] felt a weapon sharing the opposite side the assailant's trousers were removed. The buttocks of the females were visible again, except only a few [illegible] seconds. While the act of rape is a [illegible] offense [illegible] in this case where no gun for the defendant was ever exhibited, the penalty can be imposed upon one who raped a child.

The legislature did not change the rape statute when it amended the murder statute in its 1973 session. Should we conclude that the legislature intended to retain the death penalty for aggravated rape when this Court had, under Furman, set aside numerous sentences of death in rape cases on the ground that the sentence of death for rape was excessive? In amending the murder statute, did the legislature intend that a rapist be encouraged to kill his victim by providing the same penalty whether the victim was released unharmed or was left dead? I am of the opinion that the distinction between first and second degree murder which was drawn by the legislature in the 1973 session evidenced a clear legislative attempt to provide that only first degree murder would constitute a capital offense. It also certainly evidenced the intent to consider rape a capital offense only when the victim is killed.

Finally, the "graduated and proportional to the offense" test set forth in Weems, cited with approval in Furman, would require a less harsh and cruel punishment for rape where a victim is left otherwise unharmed, than where death is also inflicted upon the rape victim. See the discussion in Ralph v. Warden, Maryland Penitentiary, 438 F.2d 786 (4th Cir. 1970). It can hardly be argued that rape is a more abhorrent or heinous crime than intentional killing, yet our legislature has provided that numerous intentional killings be punished by only life imprisonment while the majority here finds that rape requires the death penalty under each and every circumstance where threat of bodily harm and coercion are used.

In conclusion, I summarize: Furman effectively abolished death as a penalty for aggravated rape in Louisiana. Our legislature has not seen fit to comply with the original requirements of the holding in Furman so as to reimpose the death penalty for rape. It has returned responsive verdicts in prosecutions for aggravated rape which give juries full discretion in determining whether to apply the death penalty or imprisonment to a defendant charged with aggravated rape. Further, our legislature has intentionally made the *killing of a person* during the perpetration or attempted perpetration of rape the subject of the death penalty. *It may be deduced that rape, accompanied by the intentional death of the victim, is the only rape which carries the death penalty.* The legislature has made numerous intentional killings subject only to imprisonment. It would indeed be unusual punishment to imprison an intentional murderer, and impose the death penalty upon one who commits rape without doing other bodily harm.

The majority holding that rape without death of the victim carries the same penalty as rape accompanied by the death of the victim invites the killing of all rape victims. Under a graduated appraisal of the severity of the offenses, when the death penalty is not imposed upon an intentional murderer, the death penalty should not be imposed upon one who commits rape under the circumstances of the case at hand.

I am of the opinion that under the holding of Furman v. Georgia, supra, the imposition of the death penalty in this case is constitutionally infirm, falling within that case's definition of cruel and unusual punishment.

I respectfully dissent.

Appendix E

Pp. 19-22, Petition for a Writ of Certiorari, Noell v. North Carolina, No. 73-6876 (filed June 11, 1974).

(D) Whether the death penalty is so inconsistent with contemporary standards of decency as to violate the Eighth and Fourteenth Amendments.

The remaining Eighth Amendment issue presented by this case is whether the death penalty is an excessive, disproportionate and aberrational punishment for the crime of rape when that crime results in no considerable bodily injury. The question is one on which a conflict apparently exists between the North Carolina Supreme Court and the cognizant federal Court of Appeals. See Ralph v. Warden, 438 F.2d 786, 793 (4th Cir. 1970) cert. denied 408 U.S. 942 (1972).

Restraints upon excessive punishment run deep in the Anglo-American tradition,[13/] and their expression in the Eighth Amendment was a principal ground of decision in Weems v. United States, 217 U.S. 349 (1910). Although the punishment involved in Weems was peculiar and outlandish in nature, condemnation of it rests expressly upon the oppressiveness of that punishment for the crime of falsifying public records, and its consequent lack of "adaptation of punishment to the degree of crime." 217 U.S. at 365. See also O'Neil v. Vermont, 144 U.S. 323, 337, 3390340 (1892)(Justice Field dissenting);[14/] Hart v. Coiner, 483

13/ Magna Carta contains three chapters requiring that amercements be proportioned to the measure of magnitude of offenses. MAGNA CARTA, ch. 20-22 (1215), printed in ADAMS & STEPHENS, SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY (1926) 42,45.

14/ Justices Harlan and Brewer agreed with Justice Field that O'Neil's long jail sentence was excessive "in view of the character of the offences committed," 217 U.S. at 366, 371, which were liquor law violations. The majority of the Court declined to reach the merits of the question because it was not properly presented and because the Eighth Amendment was not then viewed as a restraint upon the States. 217 U.S. at 331-332.

F.2d 136 139 (4th Cir. 1973), cert. denied, ____ U.S. ____, 39 L.Ed.2d 881 (1974).

This constitutional requirement of adaptation is not Procrustean: it does not command a commensurability of crime and punishment that neither legislatures nor courts, nor the sciences of penology, are sufficiently informed to calibrate. See Packer, Making the Punishment Fit the Crime, 77 HARV. L. REV. 1071, 1078-1080 (1964). However, it would ignore the entire experience of our criminal law system to deny that the grading of offenses by their seriousness is endemic to it; and, in this context, the Eighth Amendment's prohibition of cruel and unusual punishments must impose some restriction upon the power of a State to proceed aberrantly in affixing maximum penalties to grades of crime.

In assessing the death penalty for rape as that penalty was reinstituted in North Carolina by State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), this Court is not left without compelling benchmarks. For the fact is that such a punishment today is aberrant in the farthest extreme. Rape is everywhere regarded as a serious offense, but it is punished by death in only four countries outside the United States: Taiwan, Zambia, Malawi, and the Republic of South Africa.[15/] Prior to the

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15/ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10)(1968), pp. 40, 86. This survey was based upon responses received from governments or "national [United Nations] correspondents" in 109 countries and colonies. Ibid. at 4-5.

Furman decision, sixteen American States and the federal government authorized a discretionary death penalty for rape.[16] However, as of June 1, 1974, only Georgia,[17] North Carolina,[18] and perhaps Louisiana[19] impose the death penalty for the rape

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16/ 18 U.S.C. §2031 (1971); Ala. Code, tit. 14 §395 (Recomp. Vol. 1958); Ark. Stat. Ann. §41-3403 (Supp. 1969); Fla. Stat. Ann. §794.01 (1965); Ga. Code Ann. §26-2001 (1969); Ky. Rev. Stat. Ann. §435.090 (1969); La. Rev.Stat. Ann. §14:42 (1950) and La. Code of Crim. Proc., Art. 817 (1971); Md. Code Ann., art. 27, §461 (Repl. vol. 1967); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Ann. Mo. Stat. §559.20 (1953); Nev. Stat. §§200.363, 200.400 (1968); N.C. Gen. Stat. §14-21 (Repl. Vol. 1969); Okla. Stat. Ann., tit. 21, §1115 (Supp. 1970); S.C. Code Ann. §16-72 (1962); Tenn. Code Ann. §39-3702 (1955); Vernon's Tex. Pen. Code Ann., art. 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960).

17/ No. 74, Ga. 1973 Sess. Laws, at 164-165, amending Ga. Code §27-2534.1.

18/ North Carolina's new capital punishment legislation imposes the death penalty for "first degree rape," defined as rape accomplished through use of a deadly weapon or attended by "serious bodily injury" or a rape where the defendant is over sixteen years of age and the victim is a "virtuous female child under the age of twelve years." N.C. Gen. Stat. §14-21, as amended by Sec. 2, Chap. 1201, 1973 N.C. Sess. Laws.

19/ State v. Selman, La. Sup. Ct. No. 54376 (June 10, 1974) (the time to seek rehearing has not expired as of the date of the filing of this petition for certiorari. See La. Sup. Ct. Rule IX, § 1).

of an adult woman, while two other States make certain rapes of children capital.[20/] Eleven of the sixteen States that punished rape with death before Furman have now abandoned the death penalty entirely for this crime.[21/] And the North Carolina General Assembly itself, acting after the affirmance of petitioner's death sentence, has ceased to use death to punish the wide range of rape offenses made capital by the State's Supreme Court in Waddell.

20/ The new Florida statute imposes the death penalty for rape if the victim is under 11 years old and the defendant is 17 or older. Fla. Stat. §921.141 (1972). The new Tennessee statute imposes the death penalty for rape, if the victim is under twelve years of age. Tenn. Code §39-2402, as amended by Pub. Chap. 462, Tenn. Laws 1974.

21/ Arkansas, Kentucky, Mississippi, Nevada, Oklahoma, and Texas have enacted new death penalty statutes that do not make rape a capital crime. Alabama, Missouri, Maryland, South Carolina, and Virginia have not enacted any death penalty legislation after Furman.

Appendix C.

Pp. 45-51, Petition for a Writ of Certiorari, Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974)

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency.

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U.S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 380 U.S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the truism that government remains "the potent, the omnipresent teacher" [46] even when it chooses to

[46] Olmstead v. United States, 277 U.S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'" 47/ While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments, a partial diminution of retributive sentiment, and 48/ a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 174, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinghish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U.S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities-- to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U.S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

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ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.

The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommitant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution.[52] Increased respect for

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51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the resultof the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death. 53/

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).